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The Criminal Provisions of the Clean Air Act Amendments of 1990: A Continuation of the Trend Toward Criminalization of Environmental Violations

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THE CRIMINAL PROVISIONS OF THE CLEAN AIR ACT AMENDMENTS OF 1990: A CONTINUATION OF THE TREND TOWARD CRIMINALIZATION OF ENVIRONMENTAL VIOLATIONS*

MICHAEL S. ELDER**

I. INTRODUCTION

DURING the 1980's, media focus upon an increasing number of environmental disasters—the escape of poison gas at Bhopal, India and Institute, West Virginia, the nuclear meltdown at Chernobyl and the massive oil spill in the environmentally sensitive Valdez Straits—riveted the country's attention upon the public health and environmental risks imposed by the handling of bulk quantities of lethal chemicals. The sickening loss of life and massive environmental damage caused by these tragic events sparked popular cries for retribution and deterrence under the criminal law. Concurrent with these events, two Republican administrations have attempted to offset their generally negative image on environmental matters by giving criminal enforcement a priority status. Even in these times of severe cutbacks in other government programs, criminal enforcement programs have enjoyed a substantial infusion of funds and personnel.¹ These political forces have resulted in the criminal provisions of the Clean Air Act Amendments of 1990.²

The Clean Air Act Amendments of 1990 (the Amendments), borrowing upon criminal provisions found in other environmental statutes, elevate existing misdemeanors to felonies and create new offenses for knowing violations of the Clean Air Act. In addition, the Amendments impose severe felony penalties for the knowing release of hazardous air pollutants under circumstances placing other persons in imminent danger of serious bodily injury and provide penalties for negligent releases. By specifically targeting senior management officials and providing a defense for lower level employees, the Amendments impose strict accounta-

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1. The number of federal prosecutors in the United States Justice Department more than quadrupled during fiscal years 1982-1990. See *infra* note 6. In November, 1990, Congress approved legislation that tripled the number of EPA criminal investigators and established a National Enforcement Training Institute. Pollution Prosecution Act of 1990, §§ 201-205, 42 U.S.C.A. § 4321 (West Supp. 1991).

2. Clean Air Act, § 701, 42 U.S.C.A. § 7413 (West Supp. 1991).

bility upon those in the best position to ensure that environmental requirements and safe practices are observed.

The Amendments are consistent with prosecutorial and judicial efforts over the last fifteen years to extend the boundary of criminal liability for responsible corporate officials toward a strict liability standard based on corporate position. This expansion has been largely accomplished by judicial "whittling away" at traditional concepts of *mens rea* in environmental criminal cases.³ This article discusses the criminal provisions of the Clean Air Act Amendments of 1990, explores the expansion of criminal liability through judicial interpretation of the *mens rea* requirements in environmental and other public welfare statutes, and discusses the implications of these decisions for enforcement of the criminal provisions of the Clean Air Act.

II. STATE AND FEDERAL CRIMINAL ENFORCEMENT INITIATIVES

Federal and state enforcement officials make no bones about the fact that they see their mission as putting individual defendants, particularly high corporate officials,⁴ in jail for environmental violations. The justification for this prosecutorial zeal is that criminal penalties are a necessary deterrent to assure compliance with environmental regulations designed to protect public health and the environment.⁵ The former Assistant Attorney General in charge of the Environment and Natural Resources Division of the United States Department of Justice has made the government's objectives abundantly clear by warning corporate executives: "violate the environmental laws and you may save your company some money in the short run, but you personally may go to jail."⁶

A primary reason for the increased emphasis on criminal penalties is the belief that some segments of the regulated community have intentionally violated the law because the economic benefits of noncompliance are greater than the cost of civil penalties, which can be written off as a cost of doing business and passed along to the consumer. Criminal sanctions are regarded as a means of offsetting the economic benefits of noncompli-

3. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 213-17 (1991). Professor Coffee observes that recent court decisions have "reduced or eliminated the role of *mens rea*" in environmental cases by applying the responsible corporate official doctrine discussed *infra* part IV.B.1. The practical effect of these decisions, according to Professor Coffee, is that "the traditional public welfare offense has now been coupled with felony level penalties." Coffee, *supra* at 217.

4. The government's focus upon the prosecution of high corporate officials recognizes the difficulty in fashioning appropriate criminal penalties for corporations. See John C. Coffee, Jr., *"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 387 (1981).

5. See S. REP. NO. 228, 101st Cong., 2d Sess. 363 (1990), reprinted in 1990 U.S.C.A.N., 3746.

6. Former Assistant Attorney General Richard B. Stewart, speech delivered to ALI/ABA Conference on Criminal Enforcement of Environmental Laws, Washington, DC (April 11, 1991) [hereinafter Stewart Speech].

ance because, in the words of EPA's Deputy Assistant Administrator for Criminal Enforcement, "[j]ail time is one cost of doing business that cannot be passed along to the consumer."⁷

The statistics generated by specialized environmental prosecution units demonstrate the harsh rhetoric. During fiscal years 1983-90, the United States Department of Justice Environmental Crimes Section obtained indictments against 774 corporations and individuals, 559 guilty pleas and verdicts, 350 years in jail time and \$58 million in fines.⁸ In 1991, according to the United States Environmental Protection Agency, over \$5.1 million in criminal fines and 25.5 years in jail time were imposed for environmental violations.⁹ Many state prosecutorial agencies have been similarly aggressive. For example, the New York State Department of Environmental Conservation reported 68 major convictions, over \$7 million in fines and seven jail sentences during fiscal year 1990-91.¹⁰

Prosecuting individual corporate officials is an integral part of the government's enforcement strategy since corporations cannot be jailed or, for that matter, commit crimes except through their officers and employees. The federal sentencing guidelines for individuals have been applied with draconian results.¹¹ Another ominous development for corporate employees is the promulgation of federal sentencing guidelines for corporations.¹² These guidelines encourage corporations to report violations by their employees by penalizing the failure to do so. The guidelines on corporate sentencing reward the establishment of a formal program to detect violations and report them before a government investigation is commenced. Conversely, institutional blindness or tolerance of viola-

7. P. Thompson, *Doing Time for Environmental Crimes*, ENVTL. F., May-June 1990, at 32-33.

8. Stewart Speech, *supra* note 6.

9. *Water, Hazardous Waste Violations Called Focus of EPA Enforcement In 1991*, 22 ENV'T REP. (BNA) 2119 (Jan. 10, 1992).

10. NYS DEC Second Annual Report to Governor Mario M. Cuomo on Environmental Enforcement (F.Y. 1990-1991).

11. Although this article does not discuss in detail the provisions of the federal Sentencing Guidelines Manual promulgated pursuant to 28 U.S.C. § 994 (1988), it should be noted that a first time felony offender may expect to receive a substantial prison term for a conviction of an environmental felony offense. *See*, *United States v. Bogas*, 920 F.2d 363 (6th Cir. 1990); *United States v. Rutana*, 932 F.2d 1155 (6th Cir. 1991) (district court sentences which did not include incarceration were reversed and remanded for resentencing), *cert. denied*, 112 S. Ct. 300 (1991); *United States v. Pozsgai*, No. 89-1640 (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3d Cir. 1990) (a 27 month prison term was imposed for filling a 14 acre tract of wetlands without a permit in violation of the Clean Water Act), *cert. denied*, 111 S. Ct. 48 (1990); *United States v. Mills*, No. 89-3325 (N.D. Fla. Apr. 17, 1989), *aff'd*, 904 F.2d 713 (11th Cir. 1990) (a 21-month prison term was imposed for discharging fill materials in a wetlands in violation of the Clean Water Act); *see also*, Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and Sentencing Guidelines: The Time Has Come . . . And It is Hard Time*, 20 ENVTL. L. REP. (ENVTL. L. INST.) 10096 (1990)(analysis of the impacts and mechanics of the guidelines).

12. The guidelines for corporations in the Sentencing Guidelines Manual, effective November 1, 1991, do not currently apply to environmental violations although it is expected that they will be expanded in the near future to include such crimes.

tions and obstruction of investigations result in additional penalties. The guidelines encourage corporations to sacrifice their employees to escape heavy punishment. In addition, corporate fiduciary duties to shareholders may require corporations to report suspected violations and discipline corporate officials suspected of violating the law.¹³ Under these circumstances, corporations are given little choice but to serve up individual employees to the government to save their own necks from ambitious prosecutors and angry shareholders.¹⁴

III. THE CRIMINAL PROVISIONS OF THE CLEAN AIR ACT

Before the 1990 Amendments were enacted, the criminal provisions of the Clean Air Act provided misdemeanor penalties for a limited range of violations.¹⁵ The Clean Air Act Amendments of 1990 borrow liberally from the amended provisions of other environmental statutes,¹⁶ primarily the Clean Water Act¹⁷ and the Resource Conservation and Recovery Act (RCRA),¹⁸ to upgrade existing offenses to felonies and to create new offenses.¹⁹ Hence, a reading of the criminal provisions of the Clean Water Act, RCRA and the other major environmental statutes is useful to an understanding of the criminal provisions of the Amendments.²⁰

13. *Id.*

14. Both the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1988); and the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988), were amended in the mid-1980s to provide enormous maximum fines (\$1 million for each offense) for corporations held criminally responsible for the discharge of hazardous wastes or pollutants under circumstances which create a risk of serious physical injury. Federal and state prosecutors have recently obtained huge fines against Exxon, *Exxon Agrees to Pay \$1.125 Billion to Settle Litigation Over Valdez Spill*, 22 Env't Rep. (BNA) 1403 (Oct. 4, 1991), and ALCOA, *Alcoa Agrees to Pay State \$7.5 Million in Fines for Environmental Violations*, 22 Env't Rep. (BNA) 663 (July 19, 1991). EPA has also moved aggressively to penalize corporations for criminal and civil environmental violations under the authority of Clean Water Act § 508, 33 U.S.C. § 1368, and Clean Air Act § 306, 42 U.S.C.A. § 7606 (West 1983 & 1991 Supp.).

15. See Clean Air Act § 113(c), 42 U.S.C.A. § 7413(c) (West Supp. 1991).

16. Congress has increased the severity of environmental crimes across the board. Like the Clean Air Act, Resource Conservation and Recovery Act, the Clean Water Act, and most of the other environmental statutes originally contained modest misdemeanor penalties for a limited range of offenses. During the mid-1980's, these statutes were amended to provide, *inter alia*, for severe felony provisions for a greater range of offenses. The crime of endangerment crept into the 1984 amendments to RCRA and was adopted in the amendments to both the Clean Water Act and the Clean Air Act. See *infra* note 20.

17. Clean Water Act § 309(c); 33 U.S.C. § 1319(c) (1988).

18. See Resource Conservation and Recovery Act § 3008(e), 42 U.S.C.A. § 6928(e) (West 1983 & Supp. 1991).

19. S. REP. NO. 228, 101st Cong., 2d Sess. 361-63 (1990), reprinted in 1990 U.S.C.C.A.N. 3744-46.

20. See, e.g., Comprehensive Environmental Response, Compensation and Liability Act § 103(b), 42 U.S.C. § 9603(b) (1988); Safe Drinking Water Act § 3009-1(a), 42 U.S.C. § 300h-2(b) (1988); Toxic Substances Control Act § 16(b), 15 U.S.C. § 2615(b) (1988); Federal Insecticide Fungicide & Rodenticide Act § 14(b), 7 U.S.C. § 136(b) (1988); Endangered Species Act § 11(b), 16 U.S.C. § 1540(b) (1988).

After several unsuccessful and highly publicized efforts to amend the Clean Air Act in the 1980's,²¹ the public's heightened awareness of the dangers of polluted air and the election of a self-professed environmental President resulted in a consensus among the administration, Congress, industry, and environmentalists that a major overhaul of the Clean Air Act was politically and scientifically necessary to address the persistent and visible problems resulting from polluted air. Hence, on November 15, 1990, President Bush signed the Clean Air Act Amendments of 1990.²² The basic objectives of the Amendments are to reduce ozone and carbon monoxide pollution in major cities,²³ tighten emission limits on motor vehicles,²⁴ regulate 189 specific toxic air pollutants,²⁵ establish a comprehensive permit system for air emissions²⁶ and to enact substantially tougher civil and criminal penalties for violations.²⁷

The Amendments toughen the criminal enforcement provisions of the Act by incorporating many provisions found in RCRA, the Clean Water Act, and other environmental statutes. The criminal provisions of the Clean Air Act as amended can be broken down into the following four categories: (1) knowing violations of technical standards, orders, permits and regulations; (2) knowing and negligent releases of hazardous air pollutants causing the endangerment of another person; (3) record keeping violations; and (4) the knowing failure to pay required fees.

Like RCRA²⁸ and the Clean Water Act,²⁹ the Clean Air Act Amendments provide felony penalties for knowingly violating the technical requirements of the Clean Air Act and permits issued under the Act.³⁰ Congress perceived many gaps in the enforcement provisions of the pre-

21. See 136 CONG. REC. H12851-52 (daily ed. Oct. 26, 1990) (statement of Rep. Waxman). Most of the other major environmental statutes were comprehensively amended during the 1980's. See, e.g., Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending CERCLA); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (amending RCRA); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (amending the Clean Water Act). The Reagan administration's overt hostility to environmental regulation created a gridlock on clean air issues which prevented Congress from updating the Clean Air Act to address issues like ozone and acid rain which were identified in the 1980s.

22. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399-71 (codified as amended at 42 U.S.C.A. §§ 7403-7671 (West Supp. 1991)).

23. *Id.*

24. *Id.* §§ 201-235, 104 Stat. at 2471-31.

25. *Id.* at § 112(b)(1), 104 Stat. 2532-35.

26. *Id.* §§ 501-507, 104 Stat. at 2635-48. The permit system established by the Amendments is similar to the NPDES permit system under the Clean Water Act. See Clean Water Act § 402, 33 U.S.C. § 1342 (1988). The Clean Air Act permit system is designed to be enforced primarily by the state, subject to EPA oversight. Thousands of previously unregulated air emissions affecting a wide variety of industrial and commercial facilities will be drawn into the Clean Air Act's enforcement net and be subject to the criminal sanctions.

27. Clean Air Act Amendments of 1990, §§ 701-711, 104 Stat. 2672-85.

28. RCRA § 3008(d), 42 U.S.C. § 6928(d).

29. Clean Water Act § 309(c)(2), 33 U.S.C. § 1319(c)(2).

30. Clean Air Act § 113(c)(1), 42 U.S.C.A. § 7413(c)(1).

vious version of the Act,³¹ including the absence of significant civil or criminal penalties for the violation of many important regulatory requirements.³² Thus, Congress enacted felony penalties, including a five-year maximum prison term for first-time offenders for the knowing violation of State Implementation Plans, new source performance standards, acid rain control requirements, ozone control requirements, emergency orders of the EPA Administrator, and, of course, permits issued under the Act.³³

The Clean Air Act Amendments of 1990 also enact endangerment provisions similar to those found in RCRA³⁴ and the Clean Water Act.³⁵ The Amendments punish both negligent and knowing endangerment by hazardous air pollutants that place another person in imminent danger of serious bodily injury. Felony sanctions including a fine in accordance with Title 18 of the United States Code³⁶ and a maximum prison term of fifteen years³⁷ are provided for any person who knowingly releases into the ambient air any hazardous air pollutant or extremely hazardous sub-

31. S. REP. No. 228, 101st Cong., 2d Sess. 361 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3744.

32. *See, e.g.*, Clean Air Act § 303, 42 U.S.C.A. § 7603 (relating to the power of the Administrator of EPA to issue administrative orders to prevent an imminent and substantial endangerment from an air pollution source or combination of sources); 42 U.S.C.A. § 7477 (relating to administrative orders to restrain construction of major emitting facilities not meeting pre-construction requirements of the Act).

33. Violations by first-time offenders are punishable by a maximum prison term of five years and a fine in accordance with Title 18. The maximum penalties are doubled for subsequent convictions. Clean Air Act § 113(c)(1), 42 U.S.C.A. § 7413(c)(1).

34. RCRA § 3008(e), 42 U.S.C. § 6928(e). This provision was used to convict a company for "woefully inadequate" safety conditions in a drum recycling facility which, *inter alia*, exposed workers to carcinogenic substances. *United States v. Protex Indus., Inc.*, 874 F.2d 740, 742 (10th Cir. 1989). The court's opinion suggests that exposing workers to substances resulting in an increased risk of cancer constitutes serious bodily injury as defined by RCRA § 3008 (f)(6), 42 U.S.C. § 6928(f)(6).

35. Clean Water Act § 309(c)(3), 33 U.S.C. § 1319(c)(3). This provision has been used to convict a corporation and its president for illegally discharging plating waste into a public sewer system and injuring employees. *United States v. Borowski*, No. 89-256 (W.D. Mass. May 23, 1990), 21 Env't Rep. (BNA) 298 (June 1, 1990). The president of the corporation was given a 26-month jail term.

36. Title 18 of the United States Code provides a schedule of fines based on factors including the nature of the defendant and the severity of the offense. *See* 18 U.S.C. § 3571. Under Title 18, the maximum fine for knowing endangerment is \$250,000 for individuals and \$500,000 for corporations. The use of the Title 18 schedule instead of specified fines is discussed in the Senate Committee Report on the Amendments. S. REP. No. 228, 101st Cong., 2d Sess. 362 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3745.

37. Clean Air Act § 113(c)(5), 42 U.S.C.A. § 7413(c)(5), which reads:

(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than \$1,000,000 for each violation.

stance and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury.³⁸ Negligent releases³⁹ are punished as misdemeanors with a maximum prison term of one year and a fine in accordance with Title 18.⁴⁰ Subsequent convictions are subject to double the maximum punishment for first time offenders for both knowing and negligent offenses. Congress felt that stiff felony penalties for knowing endangerment and the implicit requirement of due care to prevent negligent endangerment were "particularly appropriate for sources that emit hazardous air pollutants and substances, given the threat they can pose to human health."⁴¹

The Amendments provide several defenses to the crime of knowing endangerment. First, the release of a pollutant in accordance with a standard of permit issued under the Act is not a violation.⁴² In addition, a defendant may prove as an affirmative defense by a preponderance of the evidence that the person endangered freely consented to the conduct resulting in the release and that the conduct and resulting danger were reasonably foreseeable hazards of:

- (i) an occupation, a business or a profession; or
- (ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.⁴³

In addition, the Amendments expressly preserve all general and affirmative defenses applicable to other federal offenses including the common law defenses of justification and excuse.⁴⁴

The Clean Air Act Amendments of 1990, like RCRA⁴⁵ and the Clean

38. The term "serious bodily injury" is defined as "bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." Clean Air Act § 113(c)(5)(F), 42 U.S.C.A. § 7413(c)(5)(F).

39. *Id.* § 113(c)(4), 42 U.S.C.A. § 7413(c)(4), which reads:

Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

40. Neither RCRA nor the Clean Water Act punish negligent endangerment. Thus, in this respect, the Amendments extend the boundaries of criminal penalties for environmental violations.

41. S. REP. No. 228, 101st Cong., 2d Sess. 364 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3747.

42. Clean Air Act § 113(c)(5)(A), 42 U.S.C.A. § 7413(c)(5)(A).

43. *Id.* § 113(c)(5)(C), 42 U.S.C.A. § 7413(c)(5)(C).

44. *Id.* § 113(c)(5)(D), 42 U.S.C.A. § 7413(c)(5)(D).

45. RCRA § 3008(d)(3), 42 U.S.C.A. § 6928(d)(3).

Water Act,⁴⁶ also provide substantial penalties for record-keeping and reporting violations. In enacting stiff felony penalties, Congress recognized that "[s]uch liability is especially important for self-monitoring statutes like the Clean Air Act [since] EPA's ability to oversee the regulated community under the Act is dependent to a large degree upon compliance by each source with reporting, record-keeping and monitoring requirements."⁴⁷ Thus, any person who knowingly (1) makes any false material statement or omits material information from documents required under the Act, (2) fails to notify the government of any required fact, or (3) falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required under the Act is subject, for a first offense, to a maximum prison term of two years or a fine under Title 18 or both.⁴⁸ Subsequent offenders are subject to double the maximum penalty. The legislative history emphasizes that the government bears the burden of proof of guilty knowledge and makes clear that this subsection was not intended to punish good faith mistakes or accidental or inadvertent misfilings.⁴⁹

Provisions that do not appear in the other environmental statutes are those that punish any person who knowingly fails to pay fees required by various provisions of the Clean Air Act. In an apparent anomaly, the crime of failure to pay a required fee is found in two separate provisions: under the felony provisions for knowing violations of the technical requirements of the Act⁵⁰ and in a separate provision carrying a maximum one-year term for failure to pay fees required by specified subchapters of the Act.⁵¹ Not addressed by the Act is the interesting though perhaps academic constitutional issue of whether a person or entity that knows that it is required to pay a fee but lacks the money to do so can be subjected to criminal punishment.

Consistent with Justice Department policy,⁵² the Amendments clearly target senior management personnel and corporate officers.⁵³ The term "person" is defined to specifically include any "responsible corporate official."⁵⁴ Conversely, an exemption from prosecution is provided for lower ranking employees carrying out their normal duties and who are

46. Clean Water Act § 309(c)(4), 33 U.S.C. § 1319(c)(4).

47. S. REP. No. 228, 101st Cong., 2d Sess. 363 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3746. The government has placed great emphasis upon prosecution of violations of the record keeping provisions of the environmental statutes in recognition of the fact that these programs fundamentally rely on self-monitoring. *See, e.g., United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991); *United States v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979).

48. Clean Air Act § 113(c)(2), 42 U.S.C.A. § 7413(c)(2).

49. S. REP. No. 228, 101st Cong., 2d Sess. 363 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3746.

50. Clean Air Act § 113(c)(1), 42 U.S.C.A. § 7413(c)(1).

51. *Id.* § 113(c)(3), 42 U.S.C.A. § 7413(c)(1).

52. *See infra* note 127.

53. Clean Air Act § 113(h), 42 U.S.C.A. § 7413(h).

54. *Id.* § 113(c)(6), 42 U.S.C.A. § 7413(c)(6).

not part of senior management or a corporate officer, unless the violation is a knowing or willful violation.⁵⁵

IV. MENS REA REQUIREMENTS FOR ENVIRONMENTAL CRIMINAL OFFENSES

A. Common Law Requirement of Proof of Mens Rea

Historically, criminal liability has been founded on "the concurrence of an evil-meaning mind with an evil-doing hand"⁵⁶ The common law requirement of a literally bad mind has been called variously mens rea, scienter, or criminal intent. The opinion of the Supreme Court of the United States in *Morrisette v. United States*, which traces the historical development of the requirement of an evil mind, illustrates how firmly rooted the concept of mens rea is in our criminal jurisprudence.⁵⁷

However, the application of this touchstone requirement to particular cases has been troublesome. Thus, twenty years later in *United States v. Bailey*, the Court noted that "[f]ew areas of the criminal law pose more difficulty than the *mens rea* required for any particular crime."⁵⁸ A major cause of this difficulty, of course, is that the actor's state of mind is rarely susceptible of direct proof.

The common law recognized a distinction between crimes requiring proof of specific intent and those requiring proof of general intent. Specific intent crimes were characterized by a "malicious will," i.e., an intent to disobey or disregard the law.⁵⁹ General intent crimes, which include most of the environmental crimes proscribed under federal law, merely require proof that the accused had knowledge of the facts sufficient to render the conduct a crime.⁶⁰ Unlike specific intent crimes, the prosecution need not prove a bad purpose or even that the defendant knew that his conduct was unlawful.

The confusion engendered by the sometimes murky distinctions between specific intent crimes and general intent crimes led to attempts to reform federal law to establish workable principles for determining criminal intent. In 1962, the American Law Institute proposed a hierarchy of culpable states of mind. In descending order of culpability, they are: purpose, knowledge, recklessness and negligence.⁶¹

55. *Id.* § 113(h), 42 U.S.C.A. § 7413(h).

56. *Morrisette v. United States*, 342 U.S. 246, 251 (1952); WHARTON'S CRIMINAL LAW § 27 (Charles E. Torcia ed., 14th ed. 1978).

57. *Morrisette*, 342 U.S. at 250, where the Court stated:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

58. *United States v. Bailey*, 444 U.S. 394, 403 (1980).

59. *United States v. Halderman*, 559 F.2d 31, 117 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

60. See, WHARTON'S CRIMINAL LAW, *supra* note 56, § 27.

61. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

Unlike most federal criminal statutes involving white collar crimes,⁶² environmental statutes usually require the prosecution to prove that the defendant acted "knowingly."⁶³ The federal pattern jury instructions define "knowingly" to mean:

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason.⁶⁴

B. *The Dilution of the Common Law Requirement of Mens Rea*

The common law requirement of proof of criminal intent has been diluted both legislatively and judicially.⁶⁵ First, the Supreme Court has made clear that for certain categories of public welfare offenses involving dangerous substances and products, Congress may impose criminal sanctions based on strict liability without proof of criminal intent.⁶⁶ Second, the courts have held that purposeful ignorance of the facts to avoid prosecution may serve as the equivalent of actual knowledge.

1. Responsible Corporate Official Doctrine

The courts have recognized that public welfare statutes that regulate dangerous substances and activities are designed to prevent injury to person or property, not to punish it. It has also been noted that public welfare statutes generally do not carry the stiff penalties and stigma associated with traditional types of criminal misconduct. Prosecutions under these statutes have frequently been aimed at senior management officials, who had little or no actual involvement in the conduct constitut-

62. See, e.g., 18 U.S.C. § 1341 (1988) (mail fraud - requiring proof of specific intent); 18 U.S.C. § 371 (1988) (conspiracy - requiring specific intent to violate underlying statute); 18 U.S.C. § 1001 (1988) (false statements - false representation must be made knowingly and willfully); 26 U.S.C. § 7201 (1988) (tax evasion - attempt to evade must be willful); 15 U.S.C. § 13 (1988) (Sherman Act requiring specific intent to violate Anti-trust Act law).

63. See, e.g., 42 U.S.C. § 6928(d), (e) (1988) (criminal penalties for knowing violations of RCRA); 33 U.S.C. § 1319(c) (1988) (prescribing criminal penalties for knowing violations of Clean Water Act); 42 U.S.C.A. § 7413 (West Supp. 1991) (criminal penalties for knowing violations of Clean Air Act).

64. HON. EDWARD J. DEVITT & CHARLES B. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 14.04 (3d ed. 1977).

65. The notion that conduct required a criminal state of mind in order to be criminal was so firmly rooted in our jurisprudence that courts sometimes read *into* statutes and indictments a *scienter* requirement even where not specifically articulated. See *Morrisette v. United States*, 342 U.S. 246, 252 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978). Therefore, it can be persuasively argued that the practical result of many of the environmental cases discussed hereafter is that the courts have read *out* any meaningful *scienter* requirement even though one is expressly articulated in most instances.

66. *Morrisette*, 342 U.S. at 254-58.

ing the offense. The responsible corporate officials have been targeted under these statutes because of their perceived ability to prevent violations.⁶⁷ Thus, the Supreme Court has emphasized that the responsible corporate official "usually is in a position to prevent [the violation] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."⁶⁸

The two cases most often cited in connection with the liability of responsible corporate officials are *United States v. Dotterweich*⁶⁹ and *United States v. Park*.⁷⁰ *Dotterweich* concerned the conviction of the president and general manager of a pharmaceutical company for violation of the FDA's prohibition of the introduction into interstate commerce of adulterated or misbranded drugs,⁷¹ a misdemeanor without an explicit requirement of proof of criminal intent.⁷² As the dissenting opinion made clear, there was no evidence that Dotterweich knew about or participated in the offense. "Guilt [was] imputed . . . solely on the basis of [the defendant's] authority and responsibility as president and general manager of the corporation."⁷³ The majority held that under the terms of the statute all who had "a responsible share in the furtherance of the transaction" could be held responsible for the violation.⁷⁴ The majority noted that the prosecution was based on "a now familiar type of legislation" dealing with the lives and health of people by protecting them from noxious and illicit articles. The Court approved the concept that, in order to protect the larger good, such legislation may dispense with "the conventional requirement for criminal conduct—awareness of some wrong-doing."⁷⁵ Although the Court expressed sympathy for the harshness of imposing criminal liability in the absence of proof of "consciousness of wrongdoing,"⁷⁶ it justified the result by finding that Congress had resolved the balance of hardships by placing "it upon those who have at least the opportunity of informing themselves of the existence of [the hazardous] conditions . . . rather than throw the hazard on the innocent public who are wholly helpless."⁷⁷ An analytically unsatisfactory aspect of *Dotterweich* is that the Court declined to define the type of responsible relationship which might give rise to criminal liability in other cases, leaving those determinations to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries"⁷⁸

67. WHARTON'S CRIMINAL LAW, *supra* note 58, § 27.

68. *Morrisette*, 342 U.S. at 256.

69. 320 U.S. 277 (1943).

70. 421 U.S. 658 (1975).

71. Federal Food, Drug, and Cosmetic Act § 301, 21 U.S.C. § 331(a) (1988).

72. 21 U.S.C. § 333.

73. *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting).

74. *Id.* at 284.

75. *Id.* at 280-81.

76. *Id.* at 284.

77. *Id.* at 285.

78. *Id.* Given the consistent stream of harsh rhetoric from prosecutors concerning

The doctrinal basis for the responsible corporate official doctrine was solidified in *United States v. Park*.⁷⁹ The point of departure for the Court's analysis in *Park* is that Congress may enact public welfare legislation imposing the "highest standard of care"⁸⁰ in furtherance of the public interest. The Court noted that it was well established that the FDA not only imposed a positive duty to remedy violations, but also "requirements of foresight and vigilance"⁸¹ to implement measures to ensure that violations do not occur in the first place.⁸² The Court defined the reach of the FDA's criminal provisions in terms of the power to devise measures to prevent or remedy violations.⁸³ Those entrusted with such power bear a "responsible relationship"⁸⁴ sufficient to impose criminal liability for violations. Ultimately, the Court left it to Congress to define the limits of the accountability of responsible corporate officials for products and substances affecting the public health. The only softening of the draconian reach of the Court's holding was the recognition that an accused who presented proof that he lacked the power to prevent or correct a violation would have a valid defense which the government would have to overcome by proof beyond a reasonable doubt.⁸⁵

2. Willful Blindness Doctrine

A second major dilution of the common law requirement of proof of mens rea is the willful blindness doctrine which equates purposeful ignorance with knowledge.⁸⁶ This doctrine is deemed necessary to prevent those with an obvious means of acquiring knowledge from simply closing their eyes.⁸⁷ In order to convict of a criminal offense under this doctrine, the prosecution must prove that the accused was aware of the high probability of the existence of the fact to be proved.⁸⁸ This articulation of the willful blindness doctrine has been applied in several Supreme Court cases involving possession of drugs.⁸⁹ The federal pattern jury instructions explicitly state that the element of knowledge can be proven by

their intent to utilize criminal sanctions to the maximum extent possible, committing such decisions to the discretion of prosecutors might be compared to the proverbial fox guarding the hen house. Moreover, in part because such prosecutions are in high public favor, as discussed *infra*, the courts have shown little inclination to restrain the government's efforts to expand the boundaries of criminal conduct in the environmental area.

79. 421 U.S. 658 (1975).

80. *Id.* at 676.

81. *Id.* at 672.

82. *Id.*

83. *Id.* at 673.

84. *Id.*

85. *Id.*

86. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART, § 57 at 159 (2d ed. 1961).

87. MODEL PENAL CODE § 2.02(7), construed in *United States v. Jewell* 532 F.2d 697, 706-07 (9th Cir.), cert. denied, 426 U.S. 951 (1976).

88. 532 F.2d at 705-08 (9th Cir. 1976).

89. *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969); *Turner v. United States*, 396 U.S. 398, 416-17 (1970) ("those who traffic in heroin will inevitably become aware that

proof that a defendant "deliberately closed his eyes to what would otherwise have been obvious to him."⁹⁰

The element of purposefulness was emphasized by the Ninth Circuit in a case involving violations of TSCA when it held that "the government must present evidence indicating that [the] defendant *purposely contrived* to avoid learning all of the facts in order to have a defense in the event of subsequent prosecution." (emphasis added).⁹¹

3. The Relaxed Burden of Proof of Mens Rea in Environmental Cases

Congress has relaxed the usual standard of criminal intent in federal white collar crimes⁹² by providing criminal penalties in environmental statutes for knowing and even negligent⁹³ violations. As discussed earlier, a statute requiring proof of knowledge merely requires proof that the defendant "knows factually what he is doing," not that his conduct was illegal.⁹⁴

The federal government's high degree of success in environmental prosecutions has been facilitated in no small measure by a series of decisions, primarily in cases decided under RCRA, which have considerably eased, as a practical matter, the government's burden of proof of a knowing violation. Because RCRA and the other environmental statutes are designed to protect public health and the environment, the courts have liberally construed the requirement of knowledge to effectuate the Congressional purpose,⁹⁵ rather than giving the criminal provisions of these statutes the strict construction normally accorded penal statutes.⁹⁶

The dilution of the government's burden of proof of guilty knowledge has been accomplished in two primary ways. First, the courts have relied heavily on the established principle that proof of knowledge can be established by circumstantial evidence.⁹⁷ Second, the courts have liberally uti-

the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled."); *Barnes v. United States*, 412 U.S. 837, 845 (1973).

90. *DEVITT & BLACKMAR*, *supra* note 64, § 14.09.

91. *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985); *accord*, *United States v. Kelm*, 827 F.2d 1319, 1324 (9th Cir. 1987).

92. *See WHARTON'S CRIMINAL LAW*, *supra* note 56, § 27.

93. *See, e.g.*, Clean Water Act § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1988); Clean Air Act § 113(c)(4), 42 U.S.C.A. § 7413(c)(4) (West 1983 & Supp. 1991).

94. *United States v. Baytank, Inc.*, 934 F.2d 599, 613 (5th Cir. 1991).

95. *See, e.g.*, *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 663 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1128 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

96. *See, e.g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978). Perhaps the better approach is to give the civil provisions of the environmental statutes the liberal construction that they clearly deserve while according the criminal provisions the traditional strict construction accorded penal statutes. *Id.* at 443, n. 19.

97. *E.g.*, *Frezza Bros.*, 602 F.2d at 1129, where the court stated:

The jury was entitled to infer from the totality of the circumstances surrounding the discharges that a willful act precipitated them. The Government did not

lized the presumption articulated by the Supreme Court in *United States v. International Minerals and Chemical Corp.*⁹⁸ that where dangerous products or substances are involved, the probability of regulation is so great that any one in possession of such products or substances "must be presumed to be aware of the regulation."⁹⁹ This presumption has been utilized to establish proof of knowledge in a number of appellate decisions dealing with RCRA.¹⁰⁰

One of the first cases to address the knowledge requirement of RCRA was the decision of the Third Circuit in *United States v. Johnson & Towers, Inc.*¹⁰¹ The District Court previously dismissed three counts of an indictment against individual defendants on the grounds that these defendants were not "persons" within the meaning of the criminal provisions of RCRA, which prohibits the disposal of hazardous waste without a permit.¹⁰² The Third Circuit reversed and remanded, holding that the individuals were indeed covered and went on to extensively discuss the proof of knowledge required to convict the individual defendants of a violation of RCRA.¹⁰³ The court first considered whether the required knowledge related exclusively to the acts of treating, storing and disposing of the waste, or whether the government must also prove that the accused knew that the waste material was hazardous.¹⁰⁴ The court, citing *United States v. International Minerals & Chemical Corp.*, had little difficulty in concluding that knowledge of the materials' hazardous nature was indeed required.¹⁰⁵

have to present evidence of someone turning on a valve or diverting wastes in order to establish a willful violation of the Act.

See also, *United States v. Distler*, 671 F.2d 954, 963 (6th Cir. 1981), *cert. denied*, 454 U.S. 827 (1981); *Johnson & Towers*, 741 F.2d at 669-70.

98. 402 U.S. 558 (1971).

99. *International Minerals* involved a conviction for the knowing failure to comply with an Interstate Commerce Commission regulation requiring a transporter or a shipper to indicate in shipping papers the type of liquid being shipped. The defendants were charged with failing to report the interstate shipment of corrosive liquids. *Id.*

100. See, e.g., *United States v. Baytank, Inc.*, 934 F.2d 599 (5th Cir. 1991); *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991); *United States v. Hoffin*, 880 F.2d 1033, 1038-39 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1307 (1991).

101. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

102. *Id.* at 664.

103. *Id.* at 665-70 (discussing RCRA § 3008(d)(2), 42 U.S.C. § 6928(d)(2) (1988)).

RCRA § 3008(d)(2), 42 U.S.C. § 6928(d)(2) (1988), provides in pertinent part, that it is a violation for:

[a]ny person who—

....

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—

(A) without having obtained a permit under section 6925 of this title . . . or

(B) in knowing violation of any material condition or requirement of such permit.

104. *United States v. Johnston & Towers, Inc.*, 741 F.2d 662, 667 (3d Cir. 1984).

105. *Id.* at 668. In *United States v. International Minerals & Chems. Corp.*, 402 U.S.

Since the subsection referring to the requirement of a permit was not prefaced by the word "knowingly," the Third Circuit went on to consider whether the government must also prove the defendants' knowledge that they were acting without a permit.¹⁰⁶ The court held that this omission from the statutory language was inadvertent and that proof of the accused's knowledge of the absence of a permit was a required element of the government's burden of proof.¹⁰⁷ However, the court quickly reassured the government that its burden could be met with relative ease.

First, the court confirmed that RCRA only required proof of general intent, i.e., knowledge of the conduct, not that the conduct constituted a crime.¹⁰⁸ Second, the court made clear that the required knowledge of the conduct constituting the crime could be proven by circumstantial evidence.¹⁰⁹ Specifically, the court suggested that the defendants' knowledge that a permit was required "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."¹¹⁰ Finally, the Third Circuit referred extensively to the language of *International Minerals* concerning the heightened degree of awareness of regulations required of persons dealing with highly regulated substances, referring to such persons as "those whose business it is to know"¹¹¹

The analysis of the Eleventh Circuit in *United States v. Hayes International Corporation*¹¹² is similar to the Third Circuit's analysis in *Johnson & Towers*. In *Hayes*, the lower court overturned jury verdicts finding violations of RCRA § 3008(d)(1), 42 U.S.C. § 6928(d)(1) (1983) for transportation of hazardous waste to a facility without a permit on the grounds that the government had not presented sufficient proof of knowledge.¹¹³ On appeal, the Eleventh Circuit agreed with the Third Circuit and held that knowledge of the absence of a permit is an indispensable element of the government's burden of proof even though the word knowingly does not appear in the subsection concerning the requirement

558, 563-64 (1971). The Supreme Court stated, "a person thinking in good faith that he was [disposing of] distilled water when in fact he was [disposing of] some dangerous acid would not be covered [under the regulation]." The Court thus recognized that a mistake of fact could constitute a defense under a statute requiring proof of knowledge of a prohibited act.

106. *Johnson & Towers*, 741 F.2d at 668-69. The relevant language, RCRA § 3008(d)(2)(A), 42 U.S.C. § 6928(d)(2)(A) (1988), stated: [a]ny person who (2) knowingly treats . . . (A) without having obtained a permit under section 6925 of this title.

107. *Id.*

108. *Id.* at 669. "[U]nder certain regulatory statutes requiring 'knowing' conduct the government need prove only knowledge of the actions taken and not of the statute forbidding them." Thus, the court applied the general rule that ignorance of the law is no defense to an indictment charging a knowing violation.

109. *Id.* at 667.

110. *Id.* at 670.

111. *Johnson & Towers*, 741 at 669 (quoting *United States v. International Minerals & Chems. Corp.*, 402 U.S. 558, 569 (1971)).

112. 786 F.2d 1499 (11th Cir. 1986).

113. *Hayes*, 786 F.2d at 1501.

of a permit.¹¹⁴ The court held that the Congressional purpose in enacting § 3008(d)(1) of RCRA was to prevent the transportation of hazardous wastes to unlicensed facilities. Thus, the court held that “[r]emoving the knowing requirement from this element would criminalize innocent conduct”¹¹⁵ However, the court quickly provided reassurance that the burden of proving knowledge of the absence of permit was not “unacceptable.” First, the court confirmed that the government could prove the requisite knowledge with circumstantial evidence relating to the nature of the substances.¹¹⁶ The Eleventh Circuit relied heavily on the rationale of *International Minerals* that it is fair and reasonable to impute knowledge of regulatory requirements to those who operate in heavily regulated areas.¹¹⁷ Thus, the court held that it was sufficient for the prosecution to show that the defendants knew that the substance in question was a mixture of paint and solvent and did not have to show that the defendants knew that these materials were legally hazardous wastes under RCRA.¹¹⁸ In addition, the court specifically rejected the defense argument that they did not commit a knowing violation because they did not understand that the regulations in question required a permit, stating “ignorance of the regulatory status is no excuse.”¹¹⁹

Thus, the court stated that:

In the context of the hazardous waste statutes, proving knowledge should not be difficult. The statute at issue here sets forth certain procedures transporters must follow to ensure that wastes are sent only to permit facilities. Transporters of waste presumably are aware of these procedures, and if a transporter does not follow the procedures, a juror may draw certain inferences. Where there is no evidence that those who took the waste asserted that they were properly licensed, the jurors may draw additional inferences. Jurors may also consider the circumstances and terms of the transaction. It is common knowledge

114. *Accord* United States v. Laughlin, 768 F.Supp. 957, 965-66 (N.D.N.Y. 1991). *Contra* United States v. Hoffin, 880 F.2d 1033, 1037-38 (9th Cir. 1989). *Hoffin* held that proof of knowledge of the absence of a permit was not an essential element of an offense under RCRA § 3008(d)(2)(A), 42 U.S.C. § 6928(d)(2)(A). The court noted that Congress had inserted the word “knowingly” in front of the other elements of the offense but did not do so in the subsection establishing the absence of a permit as an element of the offense. The court declined to judicially insert the word “knowingly” in front of this requirement. 880 F.2d at 1038.

115. *Hayes*, 786 F.2d at 1504. For a discussion of United States v. International Minerals & Chemicals Corp., see *supra* note 101.

116. *Hayes*, 786 F.2d at 1504.

117. *Id.* at 1503.

118. *Id.* at 1502-05. Similarly, in United States v. Dee, 912 F.2d 741, 745 (11th Cir. 1990), the Court agreed that it was unnecessary for the government to prove that the defendant knew that the substances were identified in regulations as RCRA hazardous wastes. However, the Court did hold that it was inadequate to instruct the jury that all that the government had to prove was that the defendants knew that the substances involved were chemicals, without indicating that they had to know the chemicals were hazardous. *But see* United States v. Sellers, 926 F.2d 410 (5th Cir. 1991) (no requirement that the defendant must know that the waste is harmful).

119. *Hayes*, 786 F.2d at 1505.

that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility.¹²⁰

The Eleventh Circuit, in *United States v. Greer*,¹²¹ also reinstated jury verdicts thrown out by the trial court for lack of evidence of guilty knowledge. The defendant in *Greer* was charged with causing the disposal of hazardous waste without a permit, in violation of RCRA § 3008(d)(2)(A), 42 U.S.C. § 6928(d)(2)(A) (1982), and failure to report a release of hazardous substances as required by CERCLA § 103(a), 42 U.S.C. § 9603(b)(3) (1982).¹²² The court reinstated the conviction for the disposal of hazardous waste without a permit on the basis that circumstantial evidence permitted a jury to infer guilty knowledge from the defendant's position of ownership and active involvement in the daily operation of the business.¹²³ In addition, there was evidence that the defendant had instructed an employee that the hazardous waste in question be "handled" in the same manner as previous loads, *i.e.*, illegally dumped.¹²⁴ Although not expressly articulated in the court's opinion, it was clear that the evidence showed that Greer consciously avoided becoming involved in the details of the dumping.¹²⁵

The defendant in *Greer* was also charged with failing to report the release of the hazardous waste, a violation of CERCLA, 42 U.S.C. § 9603(b)(3) (1982). To prove that Greer knew of the release, the court held that it was permissible for the jury to infer Greer's knowledge from the evidence that he was the owner and operator and was actively involved in the day to day operation of the business.¹²⁶

As these cases illustrate, the federal government has relentlessly pressed the argument that guilty knowledge can be proven solely by reference to the accused's corporate position. As the former chief federal environmental prosecutor said in 1987:

It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigations with an eye toward identifying, prosecuting and convicting the highest ranking truly responsible corporate officials.¹²⁷

While the courts have indicated that the government's burden of proof

120. *Id.* at 1504.

121. 850 F.2d 1447, 1448-51 (11th Cir. 1988).

122. *Id.* at 1448.

123. *Id.* at 1453.

124. *Id.* at 1452.

125. *See supra* part IV.B.2 (discussion of the willful blindness doctrine).

126. *United States v. Greer*, 850 F.2d 1447, 1453 (11th Cir. 1988); *accord*, *United States v. Carr*, 880 F.2d 1550, 1554 (2d Cir. 1989) (reporting requirements of CERCLA apply to "any person who is 'responsible for the operation' of a facility from which there is a release." (citation omitted)).

127. Henry Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 *Env'tl L. Rep.* (Env'tl L. Inst.) 10478, 10480 (1987).

of demonstrating guilty knowledge may be readily inferred from the accused's corporate position, none have gone so far as to accept the government's contention that the requisite knowledge can be conclusively presumed from position of corporate responsibility. This issue was squarely addressed by the First Circuit in *United States v. MacDonald & Watson Waste Oil Co.*¹²⁸ In *MacDonald & Watson*, the First Circuit reversed one of the convictions on the basis of a jury instruction that the element of knowledge could be satisfied by proof that the defendant was a responsible corporate officer.¹²⁹ The First Circuit distinguished *Park* and *Dotterweich* on the grounds that those cases involved strict liability public welfare statutes which imposed misdemeanor sanctions.¹³⁰ The court made clear that "in a crime having knowledge as an express element, a mere showing of official responsibility under *Park* and *Dotterweich* is not an adequate substitute for direct or circumstantial proof of knowledge."¹³¹ However, the court agreed with *Johnson & Towers* and similar cases "that [such] knowledge may be inferred from circumstantial evidence, including the position and responsibility of defendants such as corporate officers"¹³² and that "willful blindness to the facts constituting the offense may be sufficient to establish knowledge."¹³³ Thus, while the court recognized the existence of the line between statutes imposing strict liability without requiring proof of knowledge or intent, e.g., *Park* and *Dotterweich*, and statutes requiring proof of guilty knowledge as an element of the offense, its discussion of the inferences which may be drawn from the accused's corporate position muddles the distinction. Indeed, given the results of the cases discussed above, the distinction may be more theoretical than real.¹³⁴

The drawing of inferences of guilty knowledge from corporate position has been used to uphold convictions under other environmental statutes. Thus, in *United States v. Brittain*,¹³⁵ involving a prosecution against a plant supervisor under the Clean Water Act for violation of a NPDES permit, the Tenth Circuit appeared to accept the concept that "the willfulness or negligence of the actor [required by the Clean Water Act] would be imputed to [the accused] by virtue of his position of responsibility."¹³⁶ The accused argued that he was not a person within the meaning of the section prohibiting permit violations because he was not the holder

128. 933 F.2d 35 (1st Cir. 1991).

129. *Id.* at 50-51.

130. *Id.* at 52.

131. *Id.* at 55. *Accord* *United States v. White*, 766 F.Supp. 873, 894-95 (E.D. Wash. 1991) (court specifically rejected government's argument that a certain defendant was vicariously liable as a responsible corporate official for the acts of employees).

132. *MacDonald & Watson Waste Co.*, 933 F.2d at 55.

133. *Id.* at 55.

134. See *Coffee supra* note 3. The dilution of the *mens rea* requirement in environmental cases is extensively discussed in Ruth A. Weidel, et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100 (1991).

135. 931 F.2d 1413 (10th Cir. 1991).

136. *Id.* at 1419.

of the permit.¹³⁷ However, the court rejected that contention by noting that a person within the meaning of § 1319(c)(3) expressly includes any "responsible corporate officer."¹³⁸

V. MENS REA REQUIREMENTS UNDER THE CLEAN AIR ACT

Well established principles of statutory construction,¹³⁹ the language of the statute and the limited precedent available indicate that the knowledge requirements of the Clean Air Act will be interpreted in the same manner as in the RCRA cases discussed *supra*. In *United States v. Buckley*,¹⁴⁰ the defendant was charged with a knowing violation of the Clean Air Act's existing prohibition on the knowing emission of asbestos at levels in excess of the applicable standard.¹⁴¹ The Sixth Circuit stated that the Act required knowledge of the emission, not that the emission constituted a violation of the law.¹⁴² In addition, the court expressly relied on the presumption that one dealing in dangerous substances "must be presumed to be aware of the regulation."¹⁴³ Finally, the court held that the government could establish knowledge by showing willful blindness, i.e., that the defendant "closed his eyes to obvious facts or failed to investigate when aware of facts which demanded investigation."¹⁴⁴ Thus, mistake or ignorance as to the law clearly will not be accepted as a defense under the Amendments.¹⁴⁵ However, a mistake of fact, such as the good faith belief that the substance being released was harmless, may constitute an adequate defense.¹⁴⁶

The Amendments legislatively incorporate a number of the principles used by the courts in the RCRA cases discussed above to determine whether the person accused of knowing endangerment acted with knowl-

137. *Id.*

138. *Id.* The Amendments add a similar definition to the criminal provisions of the Clean Air Act. See Clean Air Act § 113(c)(6), 42 U.S.C.A. § 7413 (c)(6) (West 1983 & Supp. 1991).

139. It is well established that statutes related to the same general subject matter should be read *in pari materia* and construed in the same manner. 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.01-03 (4th ed. 1916). This is especially true where the legislative history demonstrates that the provisions in question were patterned after the provisions of other statutes. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *King v. Vesco*, 342 F. Supp. 120 (N.D. Cal. 1972). The legislative history of the Clean Air Act Amendments clearly demonstrates that its criminal provisions are patterned on RCRA and the Clean Water Act, S. REP. No. 228, 101st Cong., 2d Sess. 361-63, reprinted in 1990 U.S.C.C.A.N. 3741-46, and it is logical to presume that they will be construed in a similar manner.

140. 934 F.2d 84 (6th Cir. 1991).

141. *Id.* at 88.

142. *Id.*

143. *Id.* (citing *United States v. International Mineral & Chems. Corp.*, 402 U.S. 558, 565 (1991)).

144. *Id.*

145. *Buckley*, 934 F.2d at 88.

146. See, e.g., *United States v. International Minerals & Chems. Corp.*, 402 U.S. 558, 563-64; *United States v. Johnson & Towers, Inc.*, 741 F.2d at 662, 668 (1989); *United States v. Dee*, 912 F.2d at 741, 745 (1990).

edge.¹⁴⁷ The Clean Air Act appears to make clear that a person may not be convicted of the crime of knowing endangerment merely on the basis of his corporate position, as in *Dotterweich* and *Park*, by stating that "the defendant is responsible only for actual awareness or actual belief possessed."¹⁴⁸ In addition, this subsection states that a person may not be held vicariously liable for the knowledge possessed by others.¹⁴⁹ However, the Amendments specifically approve of the use of circumstantial evidence and proof of willful blindness to establish the requisite knowledge.¹⁵⁰ Similar rules for determining knowledge are found in the endangerment provisions of RCRA¹⁵¹ and the Clean Water Act.¹⁵² Under these circumstances, the courts are virtually bound to interpret the knowledge requirement of the Clean Air Act crime of knowing endangerment *in pari materia* with RCRA and the Clean Water Act.

However, the endangerment provisions of the Amendments go farther than their RCRA and Clean Water Act counterparts by punishing the negligent release of a hazardous air pollutant which thereby negligently places another person in imminent danger of death or serious bodily injury.¹⁵³ The legislative history makes clear that, due to the health hazards presented by hazardous air pollutants, Congress felt it appropriate to punish a failure to exercise due care through criminal sanctions.¹⁵⁴ What constitutes due care and negligence is left to the courts to define, presumably in light of common law principles (i.e., what a reasonable man in the same position would do), reason and experience.¹⁵⁵ This provision will undoubtedly be criticized on the grounds that it criminalizes conduct that is more properly addressed by civil remedies, including tort suits or Workman's Compensation claims by the injured party.¹⁵⁶

VI. CONCLUSIONS REGARDING ENFORCEMENT OF CLEAN AIR ACT

The Clean Air Act Amendments of 1990 provide prosecutors with an-

147. Clean Air Act § 113(c)(5)(B), 42 U.S.C.A. § 7413(c)(5)(B) (West 1983 & Supp. 1991).

148. *Id.* § 7413(c)(5)(B)(i).

149. *Id.* § 7413(c)(5)(B)(ii).

150. *Id.* "In proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information."

151. RCRA § 3008(f)(1)-(3), 42 U.S.C. § 6928(f)(1)-(3) (1988).

152. Clean Water Act § 309(c)(3)(B)(i), 33 U.S.C. § 1319(c)(3) (B)(i) (1988).

153. Clean Air Act § 113(c)(2), 42 U.S.C.A. § 7413(c)(2) (West 1983 & Supp. 1991).

154. S. REP. No. 228, 101st Cong., 2d Sess. 364 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3747.

155. *Cf.*, Clean Air Act § 113(c)(5)(D), 42 U.S.C.A. § 7413(c)(5)(D).

156. Professor Coffee has stated that "this blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control." Coffee, *supra* note 3, at 193. Professor Coffee's article observes critically that "the dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law." *Id.* Certainly, the criminalization of negligent conduct furthers that trend.

other powerful weapon to punish environmental violations as felony crimes. There is little reason to believe that the courts will interpret the knowledge requirements of the Clean Air Act with any greater solicitude for the accused than they have exhibited in cases involving RCRA. Indeed, the decision in *United States v. Buckley* expressly foretells that the knowledge requirement of the tough new crimes set out in the Amendments will be interpreted in the same loose manner. Federal prosecutors will undoubtedly continue to press the argument that corporate position alone may provide conclusive proof of guilty knowledge. On the other hand, defense lawyers will continue to argue that the distinction between civil violations and criminal misconduct should not be wiped out through strained efforts to infer guilty knowledge from corporate position and other facts tending to demonstrate that the accused "must have known." Defense lawyers will continue to invoke the venerable principle that penal statutes are to be strictly construed in favor of the accused and that the word "knowingly" must be given a meaningful construction. Ultimately, the Supreme Court may choose to decide whether scienter is to be given more than lip service in environmental prosecutions.

Because enforcement of the Clean Air Act Amendments is largely dependent upon EPA rulemaking and permitting processes which can be expected to take several years, many of the new criminal provisions are incapable of enforcement at the present time. To fill this vacuum, the EPA will be placed under extraordinary pressure to regulate an area of mind-boggling technical complexity in a relatively short amount of time. These pressures will undoubtedly produce some rules that will be ambiguous and difficult to interpret and some rules that will make no sense at all. Environmental managers and corporate employees will once again be left to the tender mercies of aggressive prosecutors to exercise discretion in the formative years of the new regulatory programs mandated by the Amendments. It remains to be seen whether criminal enforcement decisions will be made with the "conscience and circumspection" expected of government prosecutors under the law¹⁵⁷ or with the politically driven zeal that characterized many prosecutions during the 1980s.

One of the most important issues to be litigated under the endangerment provisions of the Amendments relates to the meaning of serious bodily injury, specifically whether exposure to a carcinogen *per se* constitutes serious bodily injury. The decision of the Tenth Circuit in *United States v. Protex*,¹⁵⁸ interpreting the endangerment provisions of RCRA, seems to indicate that exposure to a cancer causing substance may well be sufficient to constitute serious bodily injury.¹⁵⁹ Since many hazardous air pollutants are carcinogens or suspected carcinogens, this area will undoubtedly be ripe with litigation.

The plain congressional intent to punish negligent releases provides

157. *Nash v. United States*, 229 U.S. 373, 378 (1913).

158. 874 F.2d 740 (10th Cir. 1989).

159. *Id.* at 743.

prosecutors with a powerful new tool to expand the reach of criminal sanctions into areas of conduct hitherto untouched in the criminal provisions of RCRA and the Clean Water Act. No provision of the Clean Air Act Amendments will require a more principled exercise of prosecutorial discretion.

Another issue certain to be litigated is whether the term *ambient* air in the endangerment provisions bill precludes prosecutions involving workplace exposures. Prosecutors have shown considerable interest in such prosecutions¹⁶⁰ and can be expected to develop creative arguments depriving ambient air of its apparent meaning.

In the meantime, Title III of SARA, emissions reduction programs and technical and legal compliance audit programs have sensitized corporate managers to the need to exercise great care to control the emission of pollutants. Certainly, the threat of serious felony exposure provides additional impetus to develop effective programs to reduce emissions and achieve rigorous compliance.

160. See, e.g., *People v. Pymm*, 563 N.E.2d 1 (N.Y. 1990), *cert. denied*, 111 S. Ct. 958 (1991); *People v. Chicago Magnet Corp.*, 534 N.E.2d 962 (Ill.), *cert. denied*, 493 U.S. 809 (1989); Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535 (1987).